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In The

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

RICHARD H. C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

RICHARD H. C. TAYLOR,

Appellee.

On Appeal From The Supreme Court Of The Commonwealth Of Virginia

MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Appellees, the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, Virginia, and the Commonwealth of Virginia, respectfully move this Court to dismiss the consolidated appeal herein for want

of jurisdiction and on the ground that Appellants' challenge to the constitutional validity of the Virginia statute concerned raises no substantial federal question.

Page number references to the appendix filed by Appellants in the Virginia Supreme Court in these consolidated cases will be designated (Va. App. . .). References to the appendix of the Appellants' Jurisdictional Statement filed herein will be designated (App. . .).

OPINIONS BELOW

The judgments of the Supreme Court of Virginia are not reported but are contained in the appendix to the Jurisdictional Statement. (App. 1a-5a).

JURISDICTION

Appellants assert that jurisdiction for their appeal to this Court is conferred by 28 U.S.C. § 1257(2). This appeal raises the question of the constitutional validity of § 19.2-266[1] of the Code of Virginia (1950), as amended, which provides that in all criminal cases in Virginia the trial court "may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

[1] The Virginia Attorney General's Office is currently drafting proposed amendments to § 19.2-266 to provide additional statutory guidance for state judges and to ensure that, as a matter of policy and state law, the tradition of public trials in Virginia is fully protected from entry of unnecessary closure orders at any stage of criminal trial proceedings. It is anticipated that these proposals will be introduced in the January 1980 session of the Virginia General Assembly.

QUESTIONS PRESENTED

I. Whether the Appellants' constitutional challenge to the validity of Virginia Code § 19.2-266 is properly before this Court when no challenge to this statute was made in the State trial court or in the Supreme Court of Virginia.

II. Whether the Appellants' attack on Virginia Code § 19.2-266 raises a substantial federal question.

STATEMENT OF THE CASE

John Paul Stevenson was convicted in the Hanover County Circuit Court on July 16, 1976 for the offense of second degree murder, but on October 7, 1977 the Supreme Court of Virginia reversed his conviction and remanded the case for a new trial. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977). The conviction was reversed because a bloodstained shirt purportedly belonging to Stevenson was improperly admitted into evidence. Laboratory tests revealed that stains on the shirt matched the blood of the victim. The Virginia Supreme Court found that this shirt was improperly received in evidence at the original trial because it was "connected" to the accused solely by hearsay evidence. *Id.*[2]

The second trial of Stevenson in the Hanover County Circuit Court ended in a mistrial on May 30, 1978 (Va. App. 3), because a juror asked to be excused due to a nervous condition. (Va. App. 46). A newspaper article published by the *Richmond News Leader* the following day explained that Stevenson had been convicted before

[2] The prosecution was unable, and never attempted, to introduce the bloodstained shirt at the subsequent retrial proceedings in the Hanover County Circuit Court, but the existence of this inadmissible and highly prejudicial evidence was publicized in the newspapers. (Va. App. 46).

but that a new trial was ordered by the Virginia Supreme Court because of improper admission into evidence of a "key piece of evidence" at the original trial, which was "a bloodstained shirt obtained from Stevenson's wife soon after the killing." (Va. App. 46).

The third trial began on June 6, 1978, but that proceeding also ended in a mistrial. (Va. App. 4). That mistrial was declared because a prospective juror had read about Stevenson's previous trials and had related information to the other prospective jurors. (Va. App. 47).[3] A newspaper account published the next day stated that Stevenson had been convicted before on the murder charge but that his conviction was overturned on appeal because of evidence improperly introduced during the trial. (Va. App. 47).

The fourth trial began on September 11, 1978. At the outset Stevenson's defense counsel moved to exclude the public and press from the courtroom during the trial "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." (App. 7a). The Commonwealth's Attorney did not object. (App. 7a). Appellants Wheeler and McCarthy, who were present in the courtroom, were required to leave, but the record reflects no objection on their part at that time. (App. 7a-8a). However, subsequently that same day counsel for Appellants was granted an opportunity to be heard, and he presented written and oral arguments against the exclusion order and moved the court to open the trial to the press and public. (App. 9a-10a). Appellants' counsel argued that the exclusion order was a form of prior

[3] The Appellees admitted in the proceedings below in the cases at bar that the Appellants' appendix accurately set forth what had transpired. (Attorney General's Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition at 16).

restraint on what the press could publish and as such violated First Amendment rights (App. 10a-11a), and he suggested that other measures were available to ensure a fair trial. (App. 13a). *Appellants' counsel made no mention of § 19.2-266 of the Virginia Code.*

Stevenson's defense counsel stated, "this is the fourth time that we've . . . attempted to have a trial since the beginning. . . ." (App. 15a). He continued by saying that "we've had difficulty . . . with information . . . between jurors," and "on two previous occasions Your Honor declared a mistrial and that was the reason why I wanted to avoid [continually] coming back up to this Court and . . . having to try this case." (App. 15a). Stevenson's attorney contended that a courtroom open to the press and the public would jeopardize his client's right to a fair trial and that publicity was a particular problem in that small community. (App. 15a).

In the context of all these factors existing at Stevenson's final trial in September of 1978, Judge Richard H. C. Taylor, who was presiding, noted that the courtroom layout was such that spectators tended to be distracting to the jury. (App. 16a). He also observed that the question of whether to exclude the public involved a weighing and balancing of the interests of the public and the rights of the accused. (App. 13a). Judge Taylor declined to vacate his closure order. (App. 19a).

The Appellants petitioned the Supreme Court of Virginia for writs of mandamus (App. 25a) and prohibition (App. 28a), and filed an appeal from the closure order. (App. 24a). The Virginia Supreme Court denied relief in all three cases, citing in each order this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979). (App. 1a-5a).

The instant appeal is from those judgments of the Su-

preme Court of Virginia and attacks the constitutionality of Virginia Code § 19.2-266.

STATUTE INVOLVED

The full text of § 19.2-266 of the Code of Virginia (1950), as amended, is as follows:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.
>
> A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television, but may authorize the use of electronic or photographic means for the perpetuation of the record or parts thereof.

ARGUMENTS

I.

The Appellants' Constitutional Challenge To The Validity Of Virginia Code § 19.2-266 Is Not Properly Before This Court, And So The Appeal Is Without The Necessary Jurisdictional Basis.

It has long been established that the Supreme Court of the United States is vested with no jurisdiction unless the federal question asserted was raised and decided in the state court below. *Crowell* v. *Randell,* 10 Peters 368, 392 (1836); *Godchaux Co.* v. *Estopinal,* 251 U.S. 179 (1919); *Jett Brothers Distilling Co.* v. *Carrollton,* 252 U.S. 1, 4-6 (1920); *Phillips* v. *United States,* 312 U.S. 246, 252-253 (1941); *Beck* v. *Washington,* 369 U.S. 541, 549-550 (1962); *Cardinale* v. *Louisiana,* 394 U.S. U.S. 437 (1969).

While an appeal may lie even though the state court is not explicit in rejecting a timely challenge to the validity of a state statute on federal grounds, the challenge itself must be explicit. *See Largent* v. *Texas,* 318 U.S. 418 (1943). Also, although a state court judgment upholding action taken under a state statute may have the effect of upholding the statute, for jurisdiction of this Court on appeal it is essential "that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings and Loan Ass'n* v. *Alderman,* 324 U.S. 182, 185 (1945). "An attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority. . . ." *Phillips* v. *United States, supra* at 252.

In a federal system it is important that state courts be given the first opportunity to consider the validity of state statutes in light of constitutional challenge, because the statutes may be construed in a way that saves their constitutionality or the issue may be resolved by the state court with an adequate state ground for denial of relief. *Cardinale* v. *Louisiana, supra* at 439. The Supreme Court of Virginia was not afforded an opportunity to consider the Appellants' constitutional challenge to Virginia Code § 19.2-266 in the cases at bar.

In *Beck* v. *Washington,* 369 U.S. 541 (1962), a Washington statute was attacked in this Court by a petition for certiorari on the ground that since the state statute permitted persons in custody to challenge grand jurors, it denied equal protection to persons not in custody who were investigated by grand juries. This Court held that the point was not properly before the Court and stated:

> Although both opinions of the Washington Supreme Court discuss the *interpretation* of [the state statute],

> neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute. [citation omitted]. Petitioner's formal attack at the trial court level did not even mention [the state statute involved], much less argue that a restrictive interpretation would be unconstitutional under the Equal Protection Clause. *Id.* at 349-350. (emphasis in original).

Virginia procedure requires that constitutional challenges to state statutes be made in the trial court. *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); *King* v. *Commonwealth,* 219 Va. 171, 247 S.E.2d 368 (1978). In the cases at bar the Appellants neither challenged the constitutionality of Virginia Code § 19.2-266 in the Circuit Court of Hanover nor in the Virginia Supreme Court. Indeed, *that statute was not even discussed, cited or mentioned by Appellants,*[4] *much less challenged as being unconstitutional under the First, Sixth and Fourteenth Amendments.*[5]

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[4] See Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition filed by Appellants in the Supreme Court of Virginia. Also see the Appendix to the Jurisdictional Statement. (App. 9a-19a).

[5] The record does reflect that Judge Taylor, though not citing § 19.2-266 specifically, made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order. (App. 7a). Also, § 19.2-266 was cited by the Attorney General of Virginia in a parenthetical of his memorandum filed in the Virginia Supreme Court in the context of his argument that the state remedy of mandamus, available to enforce non-discretionary duties, was inappropriate (Memorandum of Respondent in Opposition to Petitions for Writs of Mandamus and Prohibition at 3), and by the Commonwealth's Attorney of Hanover County, in his brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial. (Brief in Opposition to Petition for Appeal at 5).

Accordingly, the Appellees respectfully submit that the Appellants' constitutional attack on Virginia Code § 19.2-266 is not properly before this Court, and this appeal should be dismissed for want of jurisdiction.

II.

Appellants' Challenge To Virginia Code § 19.2-266 Raises No Substantial Federal Question.

In the majority opinion of the recent decision of this Court in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), it was stated that the Constitution nowhere mentions any right of access to a criminal trial on the part of the public, but its guarantee of a public trial is personal to the accused. *Id.* at 2905. It was further specifically stated that "we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911. The majority opinion noted that exclusion of some members of the general public from the trial itself, as opposed to a pretrial hearing, had been upheld in the past by various state and federal courts, for example, in cases involving violent crimes against minors, cases of children forced to testify to revolting facts, situations where embarrassment could prevent effective testimony or when testimony was obscene, and to maintain order in the courtroom. *Id.* at 2910 n. 19.

Mr. Justice Powell, in his concurring opinion in *Gannett,* indicated that he would hold that the press has an interest

protected by the First[6] and Fourteenth Amendments but that the right of access to courtroom proceedings is not absolute. "It is limited both by the constitutional right of defendants to a fair trial, [citation omitted], and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Gannett,* 99 S.Ct. at 2915 (Powell, J., concurring). Similarly, even the dissenting members of the Court in *Gannett* opined that the Constitution "does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial." *Gannett,* 99 S.Ct. at 2936 (Blackmun, J., concurring in part and dissenting in part).

Section 19.2-266 of the Virginia Code, which Appellants contend is unconstitutional on its face and as applied, provides in pertinent part that "the court may, in its discretion, exclude from the trial any persons whose presence *would impair the conduct of a fair trial,* provided that the right of the accused to a public trial shall not be violated." (emphasis added). This statute obviously does not vest the state judge with unbridled discretion to close criminal trial proceedings.

Contrary to the assertion of the Appellants, Virginia Code § 19.2-266 was not "authoritatively interpreted" by the Virginia Supreme Court's action in these cases, especially in view of the degree of involvement of the statute in the cases and the potential for various bases and underlying reasoning for that Court's summary denial of relief. Unlike the state court decision involved in *Cox* v. *Louisiana,* 397 U.S. 536, 551 (1965), the case cited by Appellants in

[6] *But see Gannett,* 99 S.Ct. at 2918 (Rehnquist, J., concurring). "[T]his Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. [citations omitted]." *Id.*

this regard, the Virginia Supreme Court did not define the terms of and interpret the statute, the statute was not the focus of the appeal, and there was no challenge in the Virginia courts either to the validity or construction of the Virginia statute as there was in the Louisiana courts in *Cox* to the Louisiana statute. *See State* v. *Cox,* 156 So.2d 448 (La. 1963). Also, though the Appellants claim that the Virginia statute lacks criteria to guide a state judge in exercising his discretion, the Virginia Supreme Court has not been given the opportunity to construe the statute in the face of such a challenge to it. *See Cardinale* v. *Louisiana, supra* at 439.

The Appellees fully realize, as did the majority opinion of *Gannett,* that there is a "strong societal interest in public trials." *Gannett,* 99 S.Ct. at 2907. The openness of trial proceedings may induce unknown witnesses to come forward, enhance the quality of testimony, engender more conscientious performance by trial participants, and give the general public an opportunity to observe the administration of justice. *Id.* Also, Appellees understand that the news media play an important role of informing the public about the operation of the judicial system. These are not acceptable reasons, however, for a judicial rewriting of the United States Constitution. Rather, they are considerations for state legislatures to weigh in establishing state law and policy. (See note 1, *supra*). Closure orders should be sparingly employed and reserved for extreme and unusual circumstances.

The majority opinion in *Gannett* stated that even assuming, arguendo, that the First and Fourteenth Amendments may guarantee access in some situations, "this putative right was given all appropriate deference by the state nisi prius court in the present case." *Gannett,* 99 S.Ct. at 2911-

2912.[7] The opinion noted that none of the spectators present, including the reporter employed by the Gannett Company, objected when the closure motion was made. Nevertheless, counsel for Gannett was subsequently allowed an opportunity to be heard, and the trial judge balanced the "rights" of the public and the press against those of the defendants. The judge concluded that an open proceeding would pose a reasonable probability of prejudice to the defendants. *Id.*[8]

The Appellants in the case at bar, like the news reporter in *Gannett,* did not object to the closure motion at the time it was made (App. 6a-8a) but their counsel was subsequently allowed to present written and oral arguments to the court challenging its closure order. (App. 9a-19a). In the cases at bar the criminal trial was interrupted to afford Appellants this opportunity. Also, like the New York trial judge in *Gannett,* the Virginia trial judge assumed that the public and press had a protected interest but that there must be a balancing of those interests with the right of the defendant to a fair trial (App. 13a), and both the New York judge and the Virginia judge were of the view that an open proceeding would infringe the defendant's right to a fair trial. Judge Taylor stated that "where the rights of the

[7] Mr. Justice Powell, in his concurring opinion, also concluded that the procedures followed by the state trial court in *Gannett* comported with what would be required to protect First Amendment rights. *Gannett,* 99 S.Ct. at 2917 (Powell, J., concurring).

[8] It was also observed in this context in *Gannett* that a transcript of the closed proceeding was later available. In the cases at bar, however, the Appellants contend that they have been deprived of any way of learning about what transpired at the criminal trial of John Paul Stevenson and safely reporting the facts without potential civil liability, unless they are put to the expense of requesting preparation of a transcript of Stevenson's acquittal. (Jurisdictional Statement at 10). Appellants overlook the fact that the tape recording of Stevenson's trial has been available and remains available at the Circuit Court of Hanover County.

defendant are infringed in any way...[and] he makes the motion...and...it doesn't completely override the rights of everyone else, then I'm inclined to go along with the defendant's motion." (App. 16a).[9] Accordingly, Judge Taylor adhered to his closure order. (App. 19a).

CONCLUSION

Wherefore, Appellees respectfully submit that the instant challenge to the constitutional validity of Virginia Code § 19.2-266 is not properly before the Court and presents no substantial federal question, and Appellees respectfully move the Court to dismiss this appeal.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

[9] Stevenson's trial in September of 1978 was the fourth time that the Hanover County Commonwealth's Attorney had brought him to trial on the murder charge. The first trial had resulted in conviction, which was reversed on appeal because highly prejudicial but inadmissible evidence was introduced by the prosecution. *Stevenson* v. *Commonwealth, supra.* The second trial ended in a mistrial because a juror asked to be excused due to a nervous condition. (Va. App. 3, 46). A newspaper article published in the *Richmond News Leader* the following day explained that Stevenson had been convicted before but that a new trial was ordered by the Virginia Supreme Court because of improper admission into evidence of a "key piece of evidence" at the original trial, which was "a bloodstained shirt obtained from Stevenson's wife soon after the killing." (Va. App. 46). The third trial also ended in a mistrial because a prospective juror had read about Stevenson's previous trials and had related information to other prospective jurors. (Va. App. 4, 47). A newspaper account published the next day stated that Stevenson had been convicted before of the murder but that his conviction was overturned on appeal because of evidence improperly admitted during the trial. (Va. App. 47). The closure order was entered at the fourth trial.

CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the Appellees in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 14th day of September, 1979, I mailed, air mail postage prepaid, three copies of the foregoing Motion to Dismiss to Lawrence H. Tribe, Esquire, Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138, counsel for Appellants.

JERRY P. SLONAKER
Assistant Attorney General